STATE OF MICHIGAN

COURT OF APPEALS

CARMEN MILLER,

Plaintiff-Appellant,

v

TINA MARIE CARCONE,

Defendant-Appellee.

UNPUBLISHED
September 18, 2003

No. 239742
Washtenaw Circuit Court
LC No. 00-000544-NI

Before: Whitbeck, C.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Plaintiff Carmen Miller appeals by right a judgment of no cause of action following a jury trial. Miller sued defendant Tina Marie Carcone[1] for negligence after the car in which Miller was a passenger struck Carcone's car at an intersection as Carcone was making a left turn. Miller argues that the trial court erred in instructing the jury to consider whether the sole proximate cause of the accident was the negligence of Miller's driver, nonparty Dewayne Haner. However, because the jury did not reach the issue of proximate causation, the challenged instruction could not have made a difference in the outcome. Therefore, we affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E)(1)(b).

I. Basic Facts And Procedural History

The accident occurred at the intersection of Michigan Avenue and Prospect Street in Ypsilanti. At this intersection, Michigan has two eastbound lanes, two westbound lanes, and a left-turn lane, with a slight hill or dip on the west side of the traffic light. As Carcone drove east on Michigan and approached the traffic light at Prospect, she pulled into the left-turn lane, then stopped at the green light to wait for westbound traffic to clear before making her turn. Carcone testified that when the light turned yellow, she saw cars in the curb lane of oncoming traffic slowing down, and she started to make her turn. However, she estimated that she went only about a foot before the car in which Miller was riding struck her. She testified that she did not see the Miller car at any point before it was underneath the traffic light, at which point she estimated it was traveling around forty-five miles an hour. At her deposition, she said that the

[1] Since this suit was filed, Carcone's last name has changed to MacDonald.

Miller car was obscured by the dip in the roadway; however, at trial, she looked at photographs of the intersection taken from her vantage point and admitted that she could see cars that were in the dip area. She nonetheless maintained that on the day of the accident she did not see the Miller car coming until it was under the traffic light.

According to Carmen Miller, the light was green when she and Haner approached the intersection from the other direction, and she did not see it turn yellow. But Arthur Cornwell, who was driving his taxicab west on Michigan when the accident occurred, testified that he saw the light turn yellow when Miller's car was about 270 feet east of the intersection, then saw Miller's car accelerate to 45 or 50 miles an hour. Cornwell said that other cars in front of him were braking for the yellow light, but Miller's car "nailed it, put it in passing gear and took off to beat the light." Cornwell stated that the car would have had "more than enough time" to come to a stop before the light turned red.

Ypsilanti Police Officer David Stroud, who investigated the accident, testified that the speed limit on Michigan was thirty-five miles an hour in the area of the accident. Stroud further testified that a yellow traffic signal indicates that drivers should slow down and prepare to stop, and that a driver in the intersection preparing to make a left turn should complete the turn and clear the intersection, provided that oncoming traffic is clear or stopped.

The trial court defined negligence for the jury as "the failure to use ordinary care," which is "the care that a reasonably careful person would use." The trial court informed the jury that, by statute, it is against the law "to fail to yield the right-of-way to a vehicle approaching an intersection from the opposite direction which is within the intersection or so close to the intersection as to constitute [an] immediate hazard," and if the jury found that Carcone violated this statute, the jury could infer that she was negligent. The trial court told the jury that "proximate cause" meant that "the negligent conduct must have been a cause of plaintiff's injury" and "the injury must have been a natural and probable result of the negligent conduct." The court then explained that there could be more than one proximate cause of the accident, stating: "To be a proximate cause, the claimed negligence . . . need not be the only cause nor the last cause. A cause may be proximate although it and another cause, at the same time or in combination, produced the occurrence." Then, the trial court instructed:

> If you decide the defendant was negligent and that such negligence was a proximate cause of the occurrence, it is not a defense that the conduct of Dewayne Haner, who is not a party to this suit, also may have been a cause of this occurrence. However, if you decide that the only proximate cause of the occurrence was the conduct of Dewayne Haner, who is not a party, then your verdict should be for the defendant.

The latter instruction was included over the objection of plaintiff's counsel, who had argued that the instruction was only appropriate where there is evidence that the sole proximate cause may have been a third person's conduct, and in this case it was "inconceivable" that the accident could have occurred without the actions of Carcone. Plaintiff's counsel argued that the

court should instead instruct the jury that, when considering whether Carcone was at fault, they should not consider the fault of any nonparty to diminish any portion of blame arising from Carcone's conduct, because Carcone did not give notice of a claim that a nonparty was wholly or partially at fault pursuant to MCR 2.112(K)(2).[2] However, defense counsel argued, and the trial court agreed, that the given instruction dealt with proximate causation rather than allocation of fault. Defense counsel also pointed out that although it might be "inconceivable" that the accident could have occurred but for Carcone's actions, the test was whether Haney's negligence might have been the sole *proximate* cause of the accident.

The verdict form instructed the jury to first answer the question whether Carcone was negligent, and if the answer was yes, to then proceed to the remaining questions, including whether Carcone's negligence was the proximate cause of Miller's injuries. The jury found that Carcone was not negligent, and the trial court entered a judgment of no cause of action.

II. Jury Instruction

A. Standard Of Review

We review de novo claims of instructional error, examining the jury instructions as a whole to determine whether there is error requiring reversal, and reversing only if failure to do so would be inconsistent with substantial justice.[3]

B. Proximate Causation And Allocation Of Fault

To recover in a negligence action, a plaintiff must establish the following four elements: (1) the defendant owed a legal duty to the plaintiff, (2) the defendant breached that duty, (3) the breach proximately caused the harm, and (4) the plaintiff suffered damages.[4] At the outset, we note that the challenged instruction, codified at SJI2d 15.05, stated only the unremarkable and legally accurate proposition that a party may not be found liable for negligence if some other actor was the sole proximate cause of the harm. Because SJI2d 15.05 reflects this accurate statement of the law, we are not of the view that it must be changed in light of either MCL 600.2957, which requires the trier of fact in tort actions to allocate liability of each person in direct proportion to that person's percentage of fault, or MCR 2.112(K)(2), which forbids the trier of fact from assessing fault against a nonparty unless notice was given. We also note that the determination whether Miller breached her duty of care was a factual matter that was

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[2] Carcone had moved to amend the complaint to add an allegation of nonparty fault against the driver, Haner, but the trial court denied the motion.

[3] *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

[4] *Stephens v Dixon*, 449 Mich 531, 539; 536 NW2d 755 (1995), citing *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 150; 200 NW2d 70 (1972).

properly left to the jury, and should not have been decided as a matter of law by the trial court, as Miller urges.[5]

Even if the instruction had been erroneously given, however, we conclude that it was harmless. The trial court instructed the jury that it should find defendant "negligent" if she failed to use ordinary care—that is, if she breached her duty to Miller. As the instructions and the jury verdict form indicated, the jury was only to determine the issue of causation if it determined that Carcone was negligent, in other words, if she failed to use ordinary care with respect to Miller. As the completed jury form makes clear, the jury found that she did not. Therefore, the jury did not reach the issue whether Carcone's conduct was a cause, proximate or otherwise, of the accident.

Miller argues that the error could not have been harmless because of the way the instruction was phrased. Miller contends that because the instruction told the jurors that their "verdict should be for the defendant" if the only proximate cause of the accident was Haner's conduct, the jurors were effectively precluded from finding that Carcone had breached her duty of care. However, we decline to join Miller's speculation in this respect, because we presume that the jury understood and followed the instructions as given.[6] Moreover, reading the instructions as a whole, as we must,[7] it is clear that the challenged instruction relates only to the element of proximate causation, and was meant to clarify that Carcone could still be found liable even if Haner was *a* proximate cause of the accident, but not if he was *the* proximate cause. This instruction did not preclude the jury from finding that Carcone had breached her duty of care but was nonetheless not liable, nor did it preclude the jury from finding that Carcone had breached her duty and was a proximate cause of the accident. Accordingly, we find no error requiring reversal.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper

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[5] See *Case, supra* at 7 ("Ordinarily, it is for the jury to determine whether a defendant's conduct fell below the general standard of care.").

[6] See *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993), citing *Richardson v Marsh*, 481 US 200, 211; 107 S Ct 1702; 95 L Ed 2d 176 (1987).

[7] See *Case, supra* at 6.